

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



75-1083

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D15

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

V.

JOSEPH GAMBINO,

. Appellant.

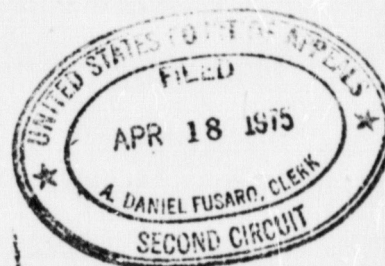
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ON APPEAL FROM AN ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

---

APPELLANT'S APPENDIX

SAXE, BACON, BOLAN & MANLEY, P.C.  
Attorneys for Appellant  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400



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(1)

72 MM. 648

**TITLE OF CASE**

**ATTORNEYS**

*For U. S.:*

vs.

Patrick T. Burke, Strike  
Force

**For Defendant:**

DATE	PROCEEDINGS
6-1-72	Filed Indictment.
6-12-72	No appearance- Adj. to 6-19-72 Ryan, J.
-19-72	Pleads not guilty. Deft ordered fingerprinted & photographed. Bail fixed at \$5,000 unsec PRB. Paroled until 4PM today to post bond. Motions ret in 10 days. WEINFELD, J.
19-72	SECOND CALL-Application to extend bail limits to include Eastern District of N.Y. granted. WEINFELD, J
-19-72	Filed notice of appearance for Joseph Gambino ( Russo, stein, Caiola and Victor, 849 St Ann's. 292-4360
19-72	Filed PRB on Joseph Gambino 5,000 unsecured, John Livingston CK.
	OVER-



PROCEEDINGS

2 Filed notice of appearance by Russo, Stein, Caiola Victor  
849 St. Ann's Ave. Bx. N.Y.

72 Filed Stipulation that ~~Joseph Gambino~~ <sup>JAMES LA ROSA</sup> is sub. as atty. for the deft.  
in place of Paul A. Victor Tenney, J.

Filed affdvt. & notice of motion to dismiss the indictment, to suppress statements and  
for pre-trial hearing. Filed memorandum of law..

3 Jury trial begun before Tenney, J.

3 Trial continued.

Trial continued.

Trial continued and concluded. Jury verdict: Deft. Guilty. Pre-sentence  
investigation ordered. Sentence adjourned to 3-12-73.  
Bail continued. Tenney, J.

Gambino- Filed consent to change atty, substituting ~~for~~ Saxe, Bacon Bolan,  
and Manley <sup>for</sup> James La Rosa esq. So Ordered Tenney, J.

Filed Judgment (# 73, 329 ) Atty. present, the deft is sentenced to ONE YEAR, execution  
of prison sentence is suspended, deft is placed on probation for a period of ONE YEAR,  
subject to the standing probation order of this Court. AND deft is FINED \$750., fine  
to be paid during period of probation at such times and in such amounts as the probation  
department may direct, or the deft is to be committed until the fine is paid or he is  
otherwise discharged according to law... Bail pending appeal is cont'd on condition  
that the deft promptly prosecutes his appeal in accordance with the rules of this  
Court and the rules of the Court of Appeals for this Circuit.... Tenney, J.

Entered 4-18-73-----

3 Filed defendants affdvt. and notice of motion for a new trial.

3 Filed memo endorsed on above motion: Defendants motion for a new trial on the ground  
of newly discovered evidence is denied after hearing counsel in open Court. So  
ordered. - Tenney, J. (m/n)

3 Filed notice of appeal to the U.S.C.A. for the 2nd Circuit from judgment filed  
4-17-73 (mailed copies to deft. and U.S. Atty.)

3 Filed Transcript of record of proceedings, dated 4-17-73.

2 Filed Transcript of record of proceedings, dated Jan 30, 30 - FEB 1, 2, 1973

Filed notice the record on appeal has this date been certified and transmitted to the  
U.S.C.A.

Joseph Gambino- Filed affidavit and notice of motion to allow deft to  
travel outside the district.

JOSEPH GAMBINO. Filed NOTICE ~~TO~~ OF MOTION TO ALLOW DEFENDANT TO  
TRAVEL OUTSIDE OF DISTRICT. Signed: SAXE, BACON, BOLAN, & MANLEY,  
attorneys for the defense.

(CONTINUED ON PAGE #2)

72 CRIM 888 640

PAGE #2

JUDGE TENNEY

DATE	PROCEEDINGS
23-73	JOSEPH GAMBINO. Motion to allow defendant to travel outside district (filed on 7-13-73) is granted upon the following conditions: (1) defendant pay amount of fine prior to departure. (2) defendant file a personal affidavit stating his itinerary in detail. (3) defendant, or his counsel, notify U.S. Attorney upon his return to district. So ordered by CHARLES TENNEY, U.S.D.J.
24-73	Joseph Gambino-Filed true copy of U.A. mandate affirming the D.C. Judgment Judgment entered 10-24-73, Clerk
12/24/74	J. Gambino - filed notice of motion re: vacate sentence ret: 11/1/74.
7/75	J. G. R. S. [illegible]
30/75	Filed Govt.'s affdvt. in opposition to motion to vacate conviction, etc.
30/75	Filed memo-end. on motion docketed 10/24/74, ...Accordingly, the motion is denied. Tenney, J. mailed notices.
-27-75	Filed notice of appeal of deft. Joseph Gambino from order of 01-31-75. mailed copies.
19-75	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.

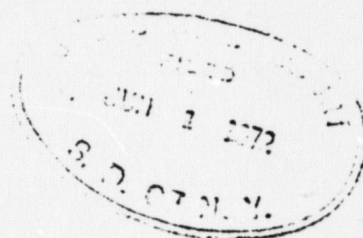


UNITED STATES OF AMERICA :

- v - :

JOSEPH GAMBINO, ::

Defendant :



INDICTMENT

.4a

72 Cr.

72 CR. 648

The Grand Jury charges:

On or about the 8th day of June, 1967 in the Southern District of New York, JOSEPH GAMBINO, the defendant, unlawfully, wilfully, knowingly and falsely represented himself to be a citizen of the United States, in that in the course of an official interview of said defendant conducted by Special Agent Edwin C. Taylor, Federal Bureau of Investigation, the defendant falsely stated that he had become a citizen of the United States in 1960, whereas in truth and in fact, as the defendant then and there well knew, he was not then and had never previously become a citizen of the United States.

(Title 18, United States Code, Section 911)

*Joseph Gambino*  
6/1/72

*Alfred North Seymour, Jr.*  
ALFRED NORTH SEYMOUR, JR.  
United States Attorney for the  
Southern District of New York



APR 17 1973

U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH GAMBINO ~

No.

72. Cr. 643

5a

On this 17th day of April, 1973, came the attorney for the government and the defendant appeared in person, and by Roy Cohen, Esq.

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty by a jury

has been convicted of the offense of unlawfully, wilfully, knowingly and falsely represented himself to be a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, he was not then and had never previously become a citizen of the United States. (Title 18, U.S.Code, Section 911)

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is sentenced to (1) ONE YEAR, execution of prison sentence is suspended, defendant is placed on probation for a period of (1) ONE YEAR, subject to the standing probation order of the Court.

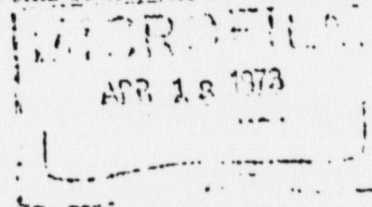
-and-

the defendant is FINED \$750., fine to be paid during period of probation such times and in such amounts as the probation department may direct, the defendant is to be committed until the fine is paid or he is otherwise discharged according to law.

Bail pending appeal is continued on condition that the defendant promptly prosecute his appeal in accordance with the rules of this Court and the rules of the Court of Appeals for this Circuit.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.



*Charles J. ...*  
United States District Judge  
*Thomas R. ...*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

6a

-----X

UNITED STATES OF AMERICA,	:	
- against -	:	72 Cr. 648
JOSEPH GAMBINO,	:	NOTICE OF MOTION
Defendant.		

-----X

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Roy M. Cohn, duly sworn to on the 21st day of October, 1974, the indictment and all the proceedings heretofore had herein, the undersigned, attorneys for the defendant, Joseph Gambino, will move this Court on the 1st day of November, 1974, at 2:00 P.M., for an order pursuant to 28 U.S.C. §2255 to vacate the conviction and the sentence imposed by this Court on April 17, 1973, and for such other and further relief as to this Court may seem just and proper.

Yours, etc.,

SAXE, BACON, BOLAN & MANLEY  
Attorneys for Defendant  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400

To: Hon. Paul J. Curran  
United States Attorney  
Southern District of New York  
Foley Square  
New York, New York 10007



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

7a

UNITED STATES OF AMERICA,

- against -

JOSEPH GAMBINO,

Defendant.

72 Cr. 648

AFFIDAVIT

STATE OF NEW YORK )  
                              ) ss.:  
COUNTY OF NEW YORK)

ROY M. COHN, being duly sworn, deposes and says:

1. I am senior partner in the firm of Saxe, Bacon, Bolan & Manley, attorneys for the defendant, Joseph Gambino, and make this affidavit in support of defendant's motion to vacate his conviction and sentence.

2. On April 17, 1973, the defendant was given a one year suspended sentence after a four day trial before the Hon. Charles H. Tenney on a one count indictment for violation of 18 U.S.C. §911, which provides that:

Whoever falsely and wilfully represents himself to be a citizen of the United States shall be fined not more than \$1,000 or imprisoned not more than three years, or both.

3. The facts surrounding this case are such that it should never have been brought to trial. The defendant, an Italian immigrant, has a poor command of the English language. This fact was clearly demonstrated at trial and on the appeals which followed. No doubt, serious questions as to the propriety of the charge and the ensuing conviction existed in this Court's mind, as is exhibited by the sentence imposed upon the defendant.

4. Defendant's difficulties with comprehending and expressing himself in English have been pointed out to the various

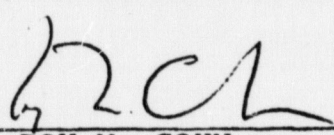
courts which have considered this case. Undoubtedly, any misrepresentation made by the defendant to the F.B.I. agent were not made with an intent to mislead the agent, but rather stemmed from the defendant's inability to fully comprehend the agent's questions. No purpose would have been served had the defendant wilfully misled the agent, and under the circumstances there is serious doubt as to such intent.

5. We ask this Court to take judicial notice of the recent decision of the Hon. Gerhard Gesell, United States District Judge, in the case of United States v. Ehrlichman et al., Criminal No. 74-116, United States District Court, District of Columbia, July 22, 1974 (a copy of which is annexed), in which Judge Gesell, in vacating Ehrlichman's conviction under 18 U.S.C. § 1001, stated:

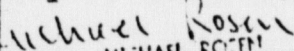
"In short, the F.B.I. interview may occur - as it did here - under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction."

We submit that it is highly improper to uphold a felony conviction and subsequent sentence under the facts of the instant case. As Judge Gesell also pointed out, such convictions are tenuous, at best, when "There is no requirement of an oath, no strict rule of materiality, and no guarantee that the proceeding will be transcribed or reduced to memorandum."

6. In light of this recent pronouncement by such a highly respected member of the federal bench, and the attendant facts and circumstances, we respectfully request that the instant motion be granted, not only as to a vacating of the defendant's sentence, but, in the interests of justice, as to an over-turning of the conviction as well.

  
\_\_\_\_\_  
ROY M. COHN

Sworn to this 21st  
day of October, 1974

  
MICHAEL ROSEN  
NOTARY PUBLIC, State of New York  
No. 413,403  
Qualified in Queens County  
Commission Expires March 30, 1978



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

9a

UNITED STATES OF AMERICA     )  
                                  )  
          v.                        ) Criminal No. 74-116  
                                  )  
JOHN D. EHRLICHMAN, ET AL.    )

MEMORANDUM AND ORDER

On July 12, 1974, defendant John Ehrlichman was convicted by a jury on two counts of making false material declarations to a grand jury, 18 U.S.C. § 1623, one count of conspiracy to violate the civil rights of a citizen, 18 U.S.C. § 241, and one count of making false representations to an agent of the Federal Bureau of Investigation, 18 U.S.C. § 1001. Prior to trial, the Court had denied defense motions attacking all of these counts on a variety of grounds, but it had reserved judgment on the applicability of § 1001 pending the presentation of evidence at trial.<sup>\*/</sup> Defendant Ehrlichman has since renewed his objection to that count in a motion for judgment of acquittal notwithstanding the verdict or for new trial. After carefully considering the evidence presented at trial and the arguments and briefs of counsel, the Court concludes that Congress did not intend that statute to be applied to statements given to the F.B.I. voluntarily and without oath or verbatim transcription during an interview initiated by the Bureau in the course of a criminal investigation.

Most of the courts that have considered the issue have been troubled by the application of § 1001 to F.B.I. interviews, although they have either denied such application on widely differing rationales or have permitted it on the ground that no particular rationale seemed persuasive in light of the Supreme Court's broad construction of that statute in such cases

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<sup>\*/</sup> This reservation was made in part because the Court recognized that the defendant's allegedly false statements to the F.B.I. would be admissible at trial on issues of intent under the other perjury counts even if the count was dismissed, and the Court feared that dismissal before a jury verdict would suggest to the jury that the Court felt that the remaining false statement counts had been proven.



as United States v. Bramblett, 348 U.S. 503 (1955), and United States v. Gilliland, 312 U.S. 86 (1941). Compare United States v. Lambert, 470 F.2d 354 (5th Cir. 1972) (rehearing en banc granted April 17, 1973); United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972); Friedman v. United States, 374 F.2d 363 (8th Cir. 1967); United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957); United States v. Stark, 131 F. Supp. 190 (D. Md. 1955); and United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953); with United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967); and United States v. Van Valkenburg, 157 F. Supp. 599 (D. Alaska 1950).

The principal difficulty with invoking § 1001 to punish those who lie to the F.B.I. when there is no legal obligation to respond to its inquiry is that the prosecution can thereafter demand sanctions as onerous as those imposed under the general perjury statute, 18 U.S.C. § 1621, without affording those suspected of criminal conduct with any of the safeguards normally provided under that statute. There is no requirement of an oath, no strict rule of materiality, and no guarantee that the proceeding will be transcribed or reduced to memorandum. See Marzani v. United States, 168 F.2d 133 (D.C. Cir.), aff'd, 335 U.S. 895 (1948). In short, the F.B.I. interview may occur -- as it did here -- under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction. Friedman v. United States, supra, at 367; United States v. Levin, supra, at 90.

This informality is particularly serious in light of the Supreme Court's recent decision in Bronston v. United States, 409 U.S. 352 (1972), in which the Court held that an incomplete, misleading or deceptive statement does not constitute perjury so long as it is literally true. If this principle is not applied to prosecutions under § 1001, then it constitutes one

more significant safeguard that can be avoided by the application of that statute to F.B.I. interviews. On the other hand, if the Bronston literal-truth test is applied to allegedly false representations under § 1001, which would appear to be the more reasonable result, then the absence of a transcript would make application of that test nearly impossible. In the instant case, defendant Ehrlichman was faced with the difficult task of arguing that his statements to the F.B.I. were literally true on the sole basis of the agent's sketchy notes, which do not purport to be a verbatim record of either the questions or the answers at issue and which were not even shown to him until shortly before trial.

In light of all these considerations, the Court concludes that § 1001 was improperly invoked in this case. Accordingly, under Rule 29(b) and (c) of the Federal Rules of Criminal Procedure, the verdict of guilty on count two of the indictment is hereby set aside and a judgment of acquittal on that count is entered in its place.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

July 22, 1974.



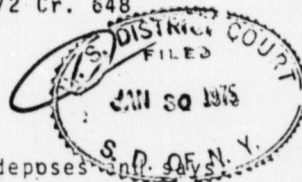
for

SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA ;  
- v - ;  
JOSEPH GAMBINO, ;  
Defendant. ;  
-----X

AFFIDAVIT IN OPPOSITION  
TO NOTICE OF MOTION

72 Cr. 648



Edward M. Shaw, being duly sworn, deposes and says:

1. I am a Special Attorney with the United States Department of Justice. I was in charge of the above prosecution and am fully familiar with the facts.
2. I make this affidavit in response to the defendant Gambino's motion to vacate his conviction and sentence.
3. Even assuming that this motion were timely filed and appropriately brought under Section 2255 of Title 18, United States Code, it remains utterly frivolous. Gambino's conviction and sentence in the Court were upheld in the Court of Appeals, and are in no way affected by the remarks of a District Judge, sitting in another Circuit, commenting upon the prosecution of some other defendant for some other crime.
4. Gambino's papers present no reason whatsoever for altering his conviction or sentence.

WHEREFORE, the Government requests that this motion be in all respects denied.

*Edward M. Shaw*

EDWARD M. SHAW  
Special Attorney  
Department of Justice

Sworn to before me this

13 day of December, 1974

Notary Public, State of New York  
No. 41-3670035  
Qualified in Queens County  
Commission Expires March 30, 1975

*[Signature]*

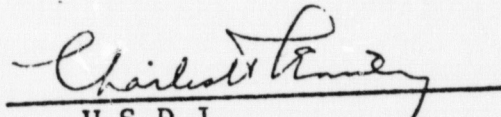
ENDORSEMENT

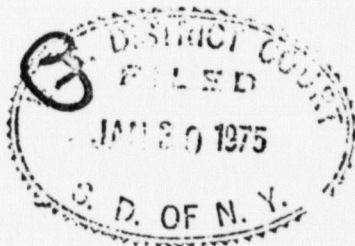
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Even assuming that this motion were appropriately brought under 28 U.S.C. § 2255, I must deny it on the merits. Petitioner's conviction and sentence were upheld by the Court of Appeals, Second Circuit. The decision of a judge in another circuit is not binding upon this Court. Moreover, that decision -- United States v. Erlichman, et al., Crim. No. 74-116 (D.D.C., July 22, 1974) -- related to 18 U.S.C. § 1001, whereas petitioner was convicted and sentenced under 28 U.S.C. § 911.

Accordingly, the motion is denied.

So Ordered.  
January 29, 1975.

  
U.S.D.J.



MICROFILM

JAN 30 1975



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA,

- against -

JOSEPH GAMBINO,

:

:

:

72 Cr. 648

NOTICE OF APPEAL

Defendant-Appellant.  
-----X

PLEASE TAKE NOTICE that the defendant, Joseph Gambino, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Memorandum and Order of the Honorable Charles H. Tenney, United States District Court Judge for the Southern District of New York denying the defendant-appellant's motion pursuant to 28 U.S.C. §2255, entered in the Office of the Clerk on January 31, 1975, and from each and every part thereof.

Dated: New York, New York  
February 26, 1975

SAXE, BACON, BOLAN & MANLEY  
Attorneys for Defendant-  
Appellant  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400

By \_\_\_\_\_

A Member of the Firm

TO: PAUL J. CURRAN  
United States Attorney  
Southern District of New York  
Federal Courthouse  
Foley Square  
New York, New York 10007





COPY RECEIVED  
PAUL J. CUBBERN  
APR 18 1973  
U.S. ATTORNEY  
SO. DIST. OF N. Y.